UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

PACIFIC BEACH CORPORATION,[1]
Employer

and Case 37-RC-4022

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142, AFL-CIO
Petitioner

Wesley M. Fujimoto, Esq.
Ryan E. Sanada, Esq.,
of Honolulu, Hawaii, for the Employer.

Danny Vasconcellos, Esq., of Honolulu, Hawaii,
for the Petitioner.

ADMINISTRATIVE LAW JUDGE'S REPORT ON OBJECTIONS AND CHALLENGES

JAMES L. ROSE, Administrative Law Judge: Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the Regional Director for Region 37 entered an amended report on objections and challenged ballots, and ordered a hearing before an Administrative Law Judge. The matter was heard by me from November 16 through November 22, 2004,[2] at Honolulu, Hawaii.[3]

The first election among employees in the Unit found appropriate for collective-bargaining was held on July 31, 2002. The Revised Tally of Ballots served on all the parties at the conclusion of the balloting showed the following:

[1] The caption is amended in accordance with the Employer's motion to amend all formal papers to reflect the correct name of the Employer.

[2] All dates are in 2004, unless otherwise indicated.

[3] Included in the record is a post-hearing affidavit of the Security Department custodian of records and copies of the security log book for July 28, 2002 through July 31, 2002.

Approximate number of eligible voters……565
Number of void ballots……1
Number of votes cast for Petitioner……212
Number of votes case against participating labor organization…...220
Number of valid votes counted……432
Number of undetermined challenged ballots……1
Number of valid votes counted plus challenged ballots……...433
Number of sustained challenges (*voters ineligible)*……..16

Timely objections were filed and a hearing was held before Administrative Law Judge Gerald A. Wacknov on these objections and challenged ballots. Judge Wacknov concluded that some challenges be sustained while others should be overruled and that certain of the Employer's actions amounted to conduct affecting the results of the election. Accordingly, he recommended that if a revised tally of ballots showed that the Union did not receive a majority of valid votes cast, then the election should be set aside and a rerun held. If, however, the Union received a majority, then it should be certified as the employees' bargaining representative.

Following exceptions to the Board, Judge Wacknov's decision was affirmed and a rerun election held on August 24, 2004. The Tally of Ballots served on all parties at the conclusion of the second election showed:

Approximate number of eligible voters……481
Number of void ballots……1
Number of votes cast for Petitioner……179
Number of votes case against participating labor organization……174
Number of valid votes counted……353
Number of challenged ballots……12
Number of valid votes counted plus challenged ballots……365

Again, both parties filed timely objections to conduct affecting the results of the election, which will be considered seriatim following consideration of the challenges.

A. The Challenged Ballots

1. The six "general cleaners."

The Union's election observers challenged the ballots of Cheong Sun Kim, Chong Ja Kim, Eon Sook Kim, Kyong Soak Lee, Shin Cha Lee, and Chu Ja Oh, on grounds they were not employees. The Employer's payroll records reflect that these six individuals were hired as "general cleaners" in 2002 and each work a few days and a hand full of hours that year. These records also show that the six worked for the Employer not at all in 2003 or 2004 before the election. Renato Flojo, the Employer's Executive Housekeeper and Project Manager, testified the six were not on the housekeeping schedule in 2004 before the election because "they were not our employee (sic.) in housekeeping at that time." Since September or October, they have in fact worked in housekeeping.

Counsel for the Employer argues that notwithstanding the de minimus nature of their employment in 2002 and none in 2003 or 2004 before the election, and in spite of Flojo's testimony, they were nonetheless employees. Therefore the Union's challenge must fail.

Further, for the Union now to challenge their ballots on grounds of de minimus hours would be tantamount to a post election challenge, which the Board's rules forbid.

The Employer argues that the six were still in its system as employees. Thus even though they did not work at all for some two years prior to the election, the challenge that they were not employees is erroneous. Such is a hyper technical argument which I reject. The Union actually did not challenge these ballots. Employee observers did and they would not reasonably be expected to know the difference between someone who listed as an employee but does not work and one who is not an employee. In fact Foljo agreed they were not employees at the time.

The Board has long held that whether one is a regular part-time employee and eligible to vote is dependent on whether that employee does bargaining unit work "with sufficient regularity to demonstrate a community of interest with remaining employees in the bargaining unit." *Milford Plains Limited Partnership d/b/a Hampton Inn,* 309 NLRB 942, 947 (1992). It is clear that these individuals lacked any real community of interest with employees in the bargaining unit, whether they are considered nonemployees or irregular casuals. Accordingly, I will recommend the challenges to their ballots be sustained.

2. The alleged supervisors.

Section 2(11) of the Act states:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall promote, discharge, assign, reward, or discipline other employees, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Union contends that the duties of Gordon Campbell, Reden Bartolome, Kahikina Kanekoa, Alma Hamamoto, Diane Matayoshi and Daniel Kadowaki, III, meet this definition and therefore the challenges to their ballots should be sustained.

In addition to the statutory criteria, any one of which is sufficient to find an individual a supervisor, the Board also considers such secondary criteria as rate of pay vis-à-vis employees, the number of supervisors per employee, perks, title and so on. As is typical in these types of cases, whether a given individual is a senior rank and file employee in the nature of a leadperson, or is low level management, is not clear. There are factors which tend to suggest either conclusion.

On balance, and as will be detailed below, I conclude that Campbell, and Kanekoa are supervisors and the challenges to their ballots should be sustained. I conclude that the challenges to the ballots of Bartolome, Hamamoto, Matayoshi and Kadowaki should be overruled. However, I also conclude that their ballots should remain sealed since their votes would not be determinative. That is, even if all four voted against representation, the Union still would have received a majority of valid votes cast.

a. Gordon Campbell

Campbell is the maintenance foreman. He has a desk, as do his boss the chief engineer and the special assistant. Campbell testified that he spends two to four hours a day at his desk,

checking e-mails from other departments requesting work, record keeping, charting the progress of jobs. He approves vacation requests and takes calls from employees who might call in sick. He then checks the work of maintenance employees to see if the jobs are done correctly, and if not, he will tell them to do it over. On one occasion he remembered, Campbell recommended an employee be promoted.

In July 2004 Campbell received a $1.00 wage increase to $19.74 per hour. In 2002 his earnings were $48,187.63. There are three supervisors named on the weekly schedule. Three days a week, all three work. Two days there are two. And two days only one supervisor is scheduled. Campbell's solo day on those schedules in evidence is Sunday. As a "supervisor or member of management" Campbell receives a 30% discount on purchases, whereas rank-and-file employees receive 20%.

John Emerick is the Director of Engineering and Campbell's immediate boss. He testified that work is assigned by work orders and that Campbell makes out about 60% of these and he does the other 40%. The other two individuals listed as supervisors do none. Emerick also testified that in situations where someone is needed to stay over past his scheduled shift, Campbell had the authority to tell (or ask) the employee to do so. Emerick also testified that on July 16 he gave Campbell a $1.00 per hour wage increase and changed his position from maintenance foreman to foreman.

On balance I conclude that Campbell has been given the authority to responsibly direct other employees by assigning them jobs, checking their work, approving vacations and time off, and asking them to work overtime. From this authority, and considering the secondary criteria such as the title of supervisor, office desk, and the 30% discount availability, I conclude that Campbell is a supervisor within the meaning of Section 2(11) of the Act and the challenge to his ballot should be sustained.

b. Reden Bartolome

Bartolome has been a supervisor in the landscaping department since at least May 2002. From the totality of the record it appears that Bartolome may have sufficient authority and exercise sufficient independent judgment to be considered a supervisor within the meaning of Section 2(11).

However, at the first election his ballot was challenged by the Union, then at the conclusion of the hearing before Judge Wacknov, the Union withdrew its challenge to Bartolome's ballot. Counsel for the Employer filed a pre-hearing motion for partial summary judgment on grounds that the Union is estopped from now contending that Bartolome is a supervisor. Counsel for the Union opposed this motion on grounds that Bartolome's duties have changed sufficiently since the first election to render its withdrawal of the first challenge of no determinative effect.

Since I had been advised that there would be additional material facts to be considered, I overruled the Employer's motion. Now, having considered the record and briefs, I find no evidence that Bartolome's duties have changed since 2002 in any significant manner.

The only evidence of much change appears in the testimony of Hiram Higashida, "the corporate environmental and conversation specialist." In that capacity, he is in charge of the landscaping employees and the curators, a position he has held "a little over two years." From 1991 to 2000 he was the landscape manager. He resigned to work for another hotel, and then

returned in 2002 to his present job. When he returned in 2002, the landscape supervisor was Bartolome. At about that time, Higashida spent about 50% of his time at the Pacific Beach Hotel and about 50% at the Pagoda Hotel, a sister property whose employees are not in the bargaining unit petitioned for here. In the period immediately prior to the second election, these figures changed somewhat – 30% at Pacific Beach and 70% at Pagoda.

Higashida testified that when he was absent from Pacific Beach, Bartolome "would be the go to person" for other employees in landscaping. This I conclude is an acknowledgment that in Higashida's absence, which is considerable, Bartolome is in charge of the Pacific Beach landscaping employees. The question is whether there is any substantive difference between being in charge 50% of the time or 70%. I conclude not. I conclude that Bartolome's duties and authority in 2004 was substantially the same as in 2002.

Neither counsel cited authority on the issue of whether in an election context a party's agreement to eligibility of a given employee estopps that party from questioning that employee's eligibility in a subsequent election in the same bargaining unit. Nor has independent research disclosed any authority precisely on point. However, in an unfair labor practice context the Board has repeatedly held that a party is barred from relitigating issues that were, or could have been, litigated in an underlying representation case. *Venture Packaging, Inc.,* 294 NLRB 544 (1989). The same bar of relitigation and basic principles of estoppel would certainly seem to apply to a second representation proceeding. Thus, absent evidence that Bartolome's duties changed in some significant way after the 2002 election, counsel's stipulation to his status should be considered binding and Bartolome should be considered eligible based on the parties' earlier stipulation. Accordingly, I will recommend that the challenge to his ballot be overruled.

c. Kahikinaokala Kanekoa

The curator department at Pacific Beach takes care of the fish and water quality in the Oceanarium, a "380,000 gallon fish tank," about two stories high. (Judge Wacknov found it to be 280,000 gallons and three stories high.) The job of curator employees is to clean the tank and feed the animals. Necessarily these employees must be certified SCUBA divers. Kanekoa was hired as a diver level 1 in 1994 and has subsequently been promoted.

At the time of the first election, Jane Fee was the curator department supervisor. Fee left her employment in 2003 and has not been replaced as such; however, from the testimony of Kanekoa and Higashida, Kanekoa's duties and authority are essentially the same as those Judge Wacknow found for Fee.

Thus Kanekoa tests prospective employees on their ability to dive and be comfortable in the tank and recommends whether they be hired. Such recommendation is effective and not routine as it requires her particular judgment. Higashida testified that he relies on her recommendations in making the final hiring decision for divers. In addition, in the absence of Higashida, which is about 70% of the time, according to his testimony, employees are told they should "go to" Kanekoa. She does not receive the 30% discount; however, I do not consider this determinative since she effectively recommends hiring, and for at least 70% of the time is the senior responsible employee present at the hotel in the curator department. I conclude that she is a supervisor within the meaning of Section 2(11) and that the challenge to her ballot be sustained.

d. Alma Hamamoto

Prior to the first election, Hamamoto had been promoted from Guest Service Agent to "Working Supervisor" and as such her ballot was challenged by the Union. Judge Wacknov found that her duties and authority did not rise to the level set forth in Section 2(11). In May 2004, she in effect took a demotion (and a reduction in pay) for personal reasons and became a senior accounting clerk. In this position she does not hire or fire employees, participate in their performance reviews or their promotions. There are no employees below her that she supervises.

A review of her testimony establishes that her duties and authority from and after May 2004 were less indicative of supervisory status than before. Indeed she lost the 30% discount and reverted to 20%. If, as Judge Wacknov found, she was not a supervisor before the first election, she could scarcely be found one at the time of the second. If anything, her authority had diminished beginning in May 2004. Accordingly, I conclude that the challenge to her ballot should be overruled.

e. Diane Matayoshi

Since September 2003, Matayoshi has worked in the position of income audit, in which job she goes "through the chits to make sure that they are rung correctly for each outlet." She double checks the work of the cashiers in the restaurants. She has no authority to hire, fire or in any way direct the work of other employees. There is really nothing in this record which would suggest she is a supervisor. Since September 2003 she has been an accounting clerk. Accordingly, I recommend that the challenge to her ballot be overruled.

f. Daniel Kadowaki, III

Kadowaki is, and has been, a senior guest services agent, in which capacity he works the front desk, along at least ten other employees. Some years ago he trained new employees, but he testified he has not done any training for years. According to his testimony, he has no authority to hire, fire, discipline or direct other employees. There is no evidence that his duties have changed since Judge Wacknov found that he was not a supervisor or management employee as alleged by the Union.

As with Bartolome, Counsel for the Employer filed a prehearing motion for partial summary judgment relating to Kadowaki since he had been found eligible by Judge Wacknov. Counsel for the Union stated that there had been material changes in the job duties of both employees and therefore the previous decision should not estopp the Union for asserting that they were supervisors.

A review of the record, particularly the testimony of Kadowaki, convinces me that there was no significant change in his job duties or authority between the first and second elections. Nor is there evidence that he in fact had any of the indicia of supervisory status set for in Section 2(11). I conclude that he was an eligible voter and that the challenge to his ballot should be overruled.

B. The Employer's objections

1. Union campaign material

Objection 1 reads:

> During the critical period prior to and including the day of August 24, 2004 representation election in the above-entitled matter, the International Longshore and Warehouse Union ("Union") distributed campaign material to the Pacific Beach Hotel employees implying governmental support of the Union. Such conduct interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and thereby interfered with the employees' ability to exercise a free and reasoned choice in the election and undermine the laboratory conditions surrounding the election.

In evidence is a NLRB flyer. It is 8 ½" by 11" and is apparently made to be folded in thirds. There is printing on both sides which generally sets forth employee rights under the Act and election procedures. There is also a listing of the Board's field offices. This flyer and a pamphlet from the Union entitled "A Guide for New Members" were distributed by union representatives. The Employer contends that by distributing the NLRB flyer, the Union suggested to employees that the Board favored the Union in the election.

In support of this position, the Employer cites several altered ballot cases, the most recent of which is *3-Day Blinds, Inc.,* 299 NLRB 110 (1990). In those cases the Board held that by reproducing an official ballot and placing an "X" in the "No" box, the employer communicated to employees that the Board favored the employer. This, of course, is not such a case.

Here the Union reproduced a flyer generally available to the public which states in layman terms the rights of employees. It certainly cannot be objectionable to inform employees, through Board produced material, of their rights – even when accompanied by a union pamphlet. The Board flyer was not altered in any way. There is nothing on either of these documents which would suggest that the Board favored the Union. Accordingly, I will recommend that objection 1 be overruled.

2. Interrogation and threats by supervisors

Objection 2 (and 3, which is in identical language) reads:

> During the critical period prior to and including August 24, 2004 representation election in the above-entitled matter, individual who were supervisors at Pacific Beach Hotel under the meaning of the Act unlawfully interrogated Pacific Beach Hotel employees and encouraged them to vote in support of the Union. Such conduct interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and thereby interfered with the employees' ability to exercise a free and reasoned choice in the election and undermine the laboratory conditions surrounding the election.

This objection is based on the alleged supervisory status of Carmelita Fontillas and the fact she discussed the election with two housekeeping employees, urging them to vote for the Union. The Employer cites *Millsboro Nursing & Rehabilitation Ctr., Inc.,* 327 NLRB 879 (1999) affirming the Board's two part test concerning whether pro-union conduct by supervisors would taint an election. To find prounion activity by supervisors objectionable requires 1) that the

employer's position concerning the election was not known to employees and 2) there were threats or promises of benefits. *Sutter Rossville Medical Center,* 324 NLRB 218 (1997).

Here, while Fontillas has some indicia of supervisory status, she was clearly considered by the Employer to be a bargaining unit employee. Her name was included on the eligibility list[4]. Second, even if she was a supervisor, her statements would not be grounds for setting aside the election. The Employer's anti-union stance was well known. There were no threats or promises of benefits made by Fontillas. Accordingly, I will recommend that objections 2 and 3 be overruled.

3. Conferring economic benefits

Objection 4 reads:

> During the critical period prior to and including the day of August 24, 2004 representation election in the above-entitled matter, the Union conferred various material economic benefits to the Pacific Beach Hotel employees. Such conduct interfered with, coerced, and restrained employees in the exercise of the Section 7 rights, and thereby interfered with the employees' ability to exercise a free and reasoned choice in the election and undermine the laboratory conditions surrounding the election.

This objection is based on the distribution of the Union's "A Guide for New Members" pamphlet which describes certain benefits members enjoy. The Employer contends that such confers a tangible economic benefit akin to offering free medical screening a few days before an election as in *Mailing Service,* 293 NLRB 565 (1989). While the Board has set aside elections where the petitioning union gives prospective employees a tangible benefit prior to the election, to distribute literature which sets forth benefits members enjoy is not the same.

Indeed, as the Board further said in *Mailing Service,* "We agree with the Regional Director that the Union was entitled to publicize an existing incident of union membership or representation. It could have provided employees with descriptive information about its health screening program. . . ." That is all the Union did here. The Union did not confer a tangible monetary benefit. It merely told employees about some benefits of being a union member. Accordingly, I will recommend that objection 4 be overruled.

4. Supervisor as election observer

Objection 5 reads:

> The Union appointed an individual who was a supervisor at Pacific Beach Hotel under the meaning of the Act to serve as an election observer for the representation election held on August 24, 2004 in the above-entitled matter. The appointed individual served as an election observer on behalf of the Union during the August 24, 2004 representation election. Such conduct interfered with, coerced, and restrained employees in the exercise of their Section 7 rights, and thereby interfered with the employees' ability to exercise a free and reasoned choice in the election and undermine the laboratory conditions surrounding the election.

[4] Fontillas was apparently discharged after the eligibility list was submitted by the Employer but before the election.

This objection is based on the allegation that Reben Bumanglag "may be a supervisor in the maintenance department" (Employer Brief at 103) and he was a union observer. The Employer contends that Bumanglag "may be a supervisor" because his job duties are similar to Gordon Campbell, who was challenged as supervisor and I find was.

Although the minimal evidence concerning Bumanglag's work does suggest that it is similar to Campbell's, the evidence is really too sketchy to find that he had any of the authority under Section 2(11). In fact he testified that Campbell directs his work and has asked him to work overtime. Further, the Employer put Bumanglag on the voter eligibility list, which I find precludes it from now arguing that he should not have been eligible. Finally, if he is a supervisor, Bumanglag is sufficiently low level that his presence as an observer would not reasonably affect the vote in favor of the Union. Accordingly, I will recommend that Objection 5 be overruled.

5. Catch-all objection

Objection 6, 7 and 8 are general allegations that by the Union's overall conduct, employees were denied the ability to exercise a free and reasoned choice. The Employer offered no additional evidence concerning these objections, and did not brief why they should be sustained. Accordingly, I will recommend that Objections 6, 7, and 8 be overruled.

C. The Petitioner's Objections

Inasmuch as I have concluded that eight of the 12 challenges be sustained even if the remaining four are all "no" votes, the Union would have received a majority of valid votes cast. Therefore, the Union's objections are moot; however, in the event there are exceptions to this decision and the Board reverses on one or more of the challenges, and if then the tally of ballots were to show the Union did not receive a majority, I would recommend the election be set aside and a rerun ordered based on the following findings concerning the Union's objections.

1. Posting the election notice

The Petitioner's first objection states:

> Commencing on July 23, 2004, and thereafter, including the day of the election (8/24/04), the Employer, by and through its employees, representatives, and agents failed to post Notice of Second Election on its premises in accordance with Section 103.20 of the Board's Rules requiring that the Employer post copies of the election notice at least three full working days prior to the day of the election; thus, limiting the opportunity of the eligible voters to exercise their statutory rights and privileges. The foregoing misconduct affected voter turnout and election results.

Though the Union presented some testimony from employees that they did not see a notice of the second election, the most credible evidence shows, and I find, that in fact an official notice was posted on the main bulletin board across from the security office where all employees swipe in and out. This notice was posted on August 19 – five days before the election.

There are other bulletin boards and time clocks throughout the facility. No notice was posted at any of these places, as they had been prior to the first election.

The issue is whether positing one notice where there is a large bargaining unit and many departments scattered throughout a large facility is substantial compliance with Section 103.20 of the Board's rules, and if not, whether the lack of compliance requires setting aside the election.

The Petitioner cites *Kilgore Corp.,* 203 NLRB 118 (1973), where the Board set aside an election because the Employer only posted one notice even though employees worked in "widely scattered locations." Similarly, in *Thermalloy Corp.,* 233 NLRB 428 (1977) the Board set aside an election, notwithstanding all eligible employees voted, where one notice was posted in one building whereas some employees worked in another, not within walking distance. And most recently, *Kilgore* was followed. *Systems West LLC*, 342 NLRB No. 82 (2004), wherein the Judge distinguished *Penske Dedicated Logistics,* 320 NLRB 373 (1995) in which the Board found that posting requirement of Section 103.20 was met for a small (61) unit even though one of rooms where the notice was posted was locked on the week-end.

The sum of these cases is that the posting requirement of Section 103.20 (amended into the Rules in 1987) is one which the Board will seriously consider, notwithstanding there are no precise criteria as to where and how many notices must be posted. The policy of the rule is to give all employees a reasonable chance to read the notice, and not only know when the election will be held but of their rights under the Act.

While it is true that all employees must swipe in near the bulletin board where the notice was posted, I conclude that one notice on one of many employee bulletin boards in a large facility such as this hotel is not sufficient compliance. There is, of course, no way of knowing whether all employees were adequately informed of the election and their rights. However, I note that in 2002, when several notices were posted, the turnout of eligible voters was 79%, whereas in 2004 it was 75%. Although 4% may not seem much, in a unit of 481 employees, such amounts to about 19 votes not cast. In an election as close as these two have been, 19 votes is significant.

I conclude that by posting only one notice of the election, the Employer was not in substantial compliance with Section 103.20 and its failure, pursuant to subparagraph (d) is grounds for setting aside the election.

2. Objections 2, 5 and 11

Counsel for the Petitioner concedes that there is no record evidence concerning objections 2, 5 and 11. Thus, the Petitioner withdrew these objections.

3. Threats of job loss through the use of subcontracts/independent contractors

Petitioner objection 3 reads:

> Commencing on or about July 23, 2004, and thereafter, the Employer, by and through its employees, representative and agents, unlawfully threatened employees that they would lose their jobs through the partial subcontracting of housekeeping work at the Hotel and the threat of expanding subcontractor/independent contractors in other Departments; thus, interfering with the right of free choice of eligible voters and destroying the laboratory conditions necessary for the conduct of a fair election.

Apparently this objection relates to the Employer's sometimes use of housekeeping employees from a company called "Team Clean." The record evidence is that there are not enough regular housekeeping employees when the hotel is at high occupancy. In such cases, regular employees are asked to work overtime, and if there are still not enough employees to cover the work required, then the independent contractor is called. This occurred before the second election. However, the Employer had used Team Clean employees at least since 2003 when Penato Flojo, the Employer's executive housekeeper and project manager, came on duty.

Though the Employer does use an independent contractor for overflow work in housekeeping, it appears this has been the case for some years. There is no testimonial evidence that employees were threatened with loss of jobs as a result of the Employer using subcontracts or independent contractors. Accordingly, I conclude that the Petitioner did prove the facts asserted in Objection 3 and it should be overruled.

4. Fraudulent misrepresentations

Petitioner objection 4 reads:

> Commencing on or about July 23, 2004 and thereafter, the Employer, by and through its employees, representatives and agents, unlawfully engaged in fraudulent misrepresentations through the submission of Employer sponsored leaflets and /or mail outs regarding the amount of union dues, medical benefits, wage increases and other benefits. The Employer also issued leaflets and/or mail outs dated July 28, 2004 and August 4, 2002, misrepresenting job closures at sister-property, while at the same time identified the NLRB elections as being "hostile takeover", by ILWU; which materially interfered with the Union's right to communicate with said eligible voters prior to the election. The Employer's misrepresentations served to falsely identify the Union as a corporate raider in competition with other business entities. Job security and retention of hours, wages and other terms and conditions of employment were the major issues of concern to voters in the proposed bargaining unit and thus, the Employer's rebutted misrepresentations immediately before the election destroyed the laboratory conditions necessary for the conduct of a fair election.

This objection is based on a number of flyers disseminated by the Employer, as well as a bogus paycheck to each employee which stated the dues deducted that pay period (the one immediately preceding the election) and the year to date.

In evaluating preelection material, the standard is set by the Board in *Midland National Life Ins. Co.,* 263 NLRB 127, 133 (1982): "Thus we will set an election aside not because of the substance of the representation but because of the deceptive manner in which it was made . . . " This standard has been discussed and expanded in some cases, but generally followed. For instance, in *Michellace, Inc. v. NLRB,* 90 F.3d 1150 (1996) the Court agreed that an election should not be set aside based on the substance of the misrepresentations alone, but only on the deceptive manner of the representations which would cause employees not to be able to distinguish truth from falsehood.

The issue, then, is wither the six flyers in evidence contain such pervasive misrepresentations that employees would be unable to separate truth from untruth. I conclude not. One flyer likens representation by the Union as a hostile takeover. Another notes that employees of the Pagoda Hotel received a wage increase and more vacation time. Another states that the Kona Beach Hotel avoided closure by reducing costs 15% and laying off

employees. Another states union representatives push themselves on employees who do no want to talk with them and lie about medical benefits if employees were to vote for the Union. Finally, a flyer is devoted to the supposed lies union representatives tell about medical benefits.

The bogus pay checks are closer to a forgery or a deceptive manner of representation requiring the election to be set aside. The checks were generated by the payroll department and looked exactly like the regular pay check, with various deductions. Included was an amount for union dues, even though there is no indication that this was accurate. Linda Morgan, the Employer's Director of Human Resources, did not know where the figures for union dues came from, or if they were accurate. Although a different figure on each of the bogus paychecks in evidence, generally the asserted dues is a little more than two and one half times the per hour rate shown on the pay stub. Thus for an employee earning $10 per hour, the Employer was telling employees that their monthly dues would be in excess of $50. This may accurately reflect the Union's dues structure, but probably not.

Nevertheless, I conclude that issuing this bogus pay checks would not be grounds for setting the election aside. Even if the asserted dues is excessive, and the checks appear real, certainly the employees would know that at some point with union representation they would be required to pay dues.

Accordingly, I will recommend that Union's Objection 4 be overruled.

5. Discipline of a known union supporter

This objection is based on allegedly unlawful discharge of Carmelita Fontillas. A charge was filed by the Union alleging her discharge with being a violation of Section 8(a)(3). Following an investigation, the General Counsel declined to issue a complaint and the charge was withdrawn. Though asserting that he did not intend to litigate the legality of the discharge, Counsel for the Union maintained that the effects of the discharge on unit employees could be a basis for setting aside the election.

At the hearing I sustained the Employer's objection to testimony concerning Fontillas' discharge. If, as must be presumed, the discharge was lawful then it could not be a basis for setting aside the election, otherwise before an election an employer would not be able to lawfully discharge employees for cause.

As noted by Counsel for the Union, absent testimony concerning the Fontillas discharge, there is no evidence of record supporting Objection 6. Accordingly, I will recommend it be overruled.

6. Offering and providing monetary gifts/ payouts

Objection 7 reads:

> Commencing on or about July 23, 2004 and thereafter, including up to the 24-hour time period just prior to the election, the Employer, by and through its representative, employees and agents, unlawfully engaged in pre-election conduct by offering and providing monetary gifts/payouts based upon Union and anti-Union sentiment, in order to interfere with the exercise of Section 7 rights of employees under the Act.

In evidence are "STATUS/RATE CHANGE FORM" for 18 kitchen employees (one form is unreadable and there are two for G. Bustamante, 6/15/04 and 7/16/04) and 6 in landscaping. The Union contends that by giving these employees promotions and wage increases, the Employer engaged in objectionable conduct. The Employer maintains that each was given in the normal course of business, and specifically in connection with reorganization of the kitchen and landscaping departments.

Counsel for the Union seems to argue that these were general pay increases and notes that Morgan testified that it had been 8 years since general pay increases had been given employees. The evidence does not support this contention. The record and testimonial evidence tends to prove that in the kitchen and landscaping departments there were some organizational changes and employees were promoted. Such does not in and of itself prove that the Employer engaged in objectionable conduct. Counsel for the Union cites *American Sunroof Corp.,* 248 NLRB 748 (1980) for the proposition that such increases are presumptively objectionable, placing the burden on the employer to prove that the timing of the raises was governed by factors other than the election.

John Lopianetzky has been the Director of Food and Beverage since August 19, 2003. He testified at length concerning the rate increases a few weeks before the election for 13 of the 82 employees in the Culinary Department. Similar increases were given three employees after the election. For many employees, particularly in the Culinary Department, there are two and sometimes three pay rates. Typically, an employee will have an "A" rate and position for his or her primary job and a "B" rate. The "B" rate is higher and is paid the employee when assigned to "B" position. Most of the changes involved making the employee's "B" rate permanent, or assigning a "B" rate.

Lopinanetzky testified that on his return to the Hotel in 2003, he began making some changes and that most of pay grade changes in 2004 were as a result of restructuring. Some were the result of employees leaving or retiring. There is nothing in his testimony or the documentary evidence which would tend to dispute that the pay grade changes were other than done in the normal course of business. I credit Lopianetzky and conclude that the pay grade changes in the Culinary Department did not amount to objectionable conduct.

The same result, however, is not the case with the Landscaping Department. There are seven employees in the Landscaping Department, including Bartolome. As of May 2002, Bartolome had the "B" position of Supervisor I and, apparently, the highest rate available for landscaping employees. On July 1, the other six employees (which included one transfer) received rate changes and pay increases.

As noted above, Hiram Higashida is in charge of the landscaping and curator departments at both the Pacific Beach Hotel and the Pagoda Hotel. He testified that when he returned to the Hotel in 2002 he started evaluating the duties of his landscaping employees and determined that the assistant gardeners should be made gardeners. Then, according to his testimony, two years later, in early 2004, he decided to make the changes. However, he did not get around to doing so until July.

I do not credit Higastida. His testimony was, at best, conclusionary. He gave no persuasive reason for "restructuring" the department or why he would give everyone in the department (other than the supervisor) a pay raise a few weeks before the rerun election or why it took him so long to effectuate the changes. He testified that not only did the wage increases not have anything to do with forthcoming election, he did not even know about the election – a

statement I find wholly incredible. I do not believe the Employer met its burden of proving these pay increases were benign and given in the normal course of business. Accordingly, I conclude that Union's Objection 7 should be sustained.

7. Incomplete "Excelsior list"

Union Objection 8 reads:

> Commencing on or about July 23, 2004 and thereafter, the Employer, by and through its employees, representatives and agents, provided the Union wholly inaccurate, misleading, and incomplete information on the "Excelsior list" and engaged in other practices to prevent ILWU supporters and campaigners access to employees' home and/or residence (see Objection IV). The Employer's failure to provide an adequate and complete listing of names and addresses of all eligible voters resulted in an usurpation of the Board's power to determine voter eligibility and materially interfered with the Union's right to communicate with said eligible voters prior to the election, and prevented a designation by a majority of a representative segment of eligible voters from indicating their choice of Union representation or note in the election. By these acts, The Employer unlawfully interfered with the Section 7 rights of the employees.

On July 30 the Board's sub-regional office received the names and addresses of 498 employees purporting to comply with Excelsior list requirement. On August 9, an attorney for the Union wrote the Employer contending that 26 addresses were incorrect and on August 10 amended this to state that 43 addresses were incorrect. There was an exchange of correspondence, with Counsel for the Employer stating that the Employer was making its best efforts to correct any inaccuracies. On August 18, Counsel for the Employer sent Counsel for a Union list of updated addresses.

Notwithstanding the Employer's efforts to insure that the addresses of employees submitted to the Union were accurate, the Employer was unable to correct them all. Thus Counsel for the Employer, on brief, stated: "However, based on the Employer's investigation of the matter, 23 of the allegedly incorrect addresses were, in fact correct. Further four of the employees alleged by the Union to have incorrect addresses no longer worked at Pacific Beach Hotel. Therefore, there were just 24 incorrect addresses on the Excelsior List. This constitutes an inaccuracy rate of under 5%."

In evidence are union campaign mailers returned for insufficient addresses for 10 employees. Also, William Udani, a field organizer for the Union, testified that he went to homes to talk to employees and on occasion was told the employee did not live at that address. This testimony is fairly vague, but together with the returned mailers and Counsel for the Employer's statement tends to support the conclusion that there were inaccuracies in the Excelsior list – a matter which was in fact stipulated to by Counsel.

The Employer maintains that it was in substantial compliance with the Excelsior list rule and that inaccuracies of less than 5% is not sufficient under Board law to require setting aside an election. While the Board has in the past considered the percentage of address inaccuracies to be determinative, the Board now also considers whether the number of inaccuracies is within or more than the election margin. *Woodman's Food Market, Inc.,* 332 NLRB 503 (2000). Thus notwithstanding the employer's good faith in attempting to submit a complete and accurate list of names and addresses, if the number of inaccurate addresses exceeds the margin of the vote, then such is sufficient to set aside the election.

Here the Union's margin of victory was 5 votes. However, if all 12 challenges were to be overruled and all those votes were against representation, then the Union would lose by 7 votes. Thus the 23 inaccuracies admitted by the Employer, or even the 10 who did not receive mailers would be more than the election margin. Accordingly, I conclude that Objection 8 should be sustained.

8. Overly broad no-solicitation rule

Objection 9 states

> Commencing on or about July 23, 2004 and thereafter, the Employer, in order to discourage membership in a labor organization, promulgated, implemented, and never rescinded an overly broad and unlawful no solicitation rule.

In the previous case, Judge Wacknov found that the Employer's policy concerning where and when employees and non employees could engage in solicitation (contained in its employee handbook) was overly broad, invalid, and a basis to set aside the election, a finding which was affirmed by the Board.

On April 15, 2003, shortly after Judge Wacknov issued his decision, the Employer undertook to amend this policy in order to conform to the Board's standards by issuing a memo to all employees. The Union does not contend that the revised policy is invalid, only that it has not adequately been distributed to all employees. Morgan testified that the memo is, and has been, inserted into the employee manual given new employees, and current employees were told to take the old policy out of their manuals and insert the new one. She also testified that the memo was placed on various bulletin boards and each department had meetings with employees to discuss the new policy. Several employee witnesses also so testified.

Counsel for the Union maintains that since Morgan was not able to "guarantee" that all employees were given a copy of the memo, the Employer has not presented substantial evidence that the unlawful policy has been fully rescinded.

I disagree. The credible evidence is that in fact the Employer published the revised policy and undertook to advise all employees of it. There is no evidence that the old unlawful policy has been enforced in any way. On balance, I conclude that the Union's objection concerning the no-solicitation policy should be overruled.

9. Catch-all objection

Objection 10 reads:

> By such other acts and deeds, the Employer, by and through it agents, employees, and representative, interfered with and coerced employees in exercise of their rights under Section 7 of the Act, and said acts and deeds precluded a fair election.

The Union offered no evidence on this objection and I recommend it be overruled.

D. Conclusions and Recommendations

I recommend that all the challenged ballots remain sealed, that the Employer's objections to conduct affecting the results of the election be overruled and that the Union be certified as the duly elected representative of all employees in the bargaining unit found appropriate by the Regional Director for Region 37.[5]

In the event that following exceptions to this decision, the Board should make rulings on the challenged ballots such that a revised tally of ballots would show a majority not to have voted in favor of the Union, then I recommend that Petitioner objections 1, 6 and 7 be sustained and a third election be conducted.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:

ORDER[6]

The Employer's objections to conduct affecting the results of the mail ballot election in the above matter are overruled. The Regional Director for Region 37 shall certify the Petitioner as the collective-bargaining representative of employees in the appropriate unit.

Dated, San Francisco, California, February 11, 2005.

James L. Rose
Administrative Law Judge

[5] See Amended Report on Objections and Challenged Ballots, Order Directing Hearing and Notice of Hearing dated October 22, 2004.

[6] Any party may, under the provisions of Section 102.67 and 102.69 of the Board's Rules and Regulations, file exceptions to this report with the Board in Washington, D.C., within fourteen (14) days from the issuance of this report. Immediately upon filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. Exceptions must be received by the Board in Washington, D.C. by February 24, 2005.